Supreme Court, U. S.
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No. 74-1042

In the
Supreme Court of the United States
OCTOBER TERM, 1974

ERNST & ERNST,
Petitioner,
vs.
OLGA HOCHFELDER, et al.,
Respondents.

ERNST & ERNST,
Petitioner,
vs.
LEON S. MARTIN, et al.,
Respondents.

BRIEF FOR RESPONDENTS, OLGA HOCHFELDER, ET AL. AND LEON S. MARTIN, ET AL., IN OPPOSITION TO PETITION FOR CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLARD L. KING
Attorney for Respondents

KING, ROBIN, GALE & PILLINGER
135 South LaSalle Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

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JURISDICTION

This is an attempt to secure certiorari from a non-final opinion of the Court of Appeals on the reversal for trial of a summary judgment. Petitioner cites no case, and we find none, where this Court has allowed certiorari in such a situation.

Petitioner filed this petition, without warning, on the ninetieth day after the Court of Appeals denied its petition for rehearing. Petitioner requested no stay of the mandate in the Court of Appeals as required by the Seventh Circuit Rule 21.* The mandate has long since issued and the case is pending for trial before the District Court.

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*CIRCUIT RULE 21. Whereas an increasingly large number of unsuccessful petitions for certiorari have been filed in the Supreme Court from this circuit in recent years. In the interests of minimizing unnecessary delay in the administration of justice, mandate will not be stayed hereafter simply upon request. On the contrary, mandate will issue pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure except upon a showing, or an independent determination by the court, of probable cause to believe that a petition would not be frivolous, or filed merely for delay.

ARGUMENT

Petitioner argues that there is a conflict between the circuits which justifies certiorari. The circuits are now engaged in working out on a case by case basis the degree of culpability which justifies a finding that a defendant aided and abetted a violation of Section 10b of the Securities Act and its corollary SEC Rule 10b-5.

This problem demands a full development of the facts in each case. This Court should not cut off that development by premature certiorari. Any conflict between the circuits is purely verbal.

By certifying to the SEC, each year for 19 years, that First Securities Company was solvent when in fact it was wholly insolvent, Ernst & Ernst was guilty of gross violation of its professional duty, which was the cause of plaintiffs' loss.

In addition to the affidavits recited in the opinion of the Court of Appeals (503 F^{2} 1100 at 1108-1111; Pet. Appendix 16a-19a), we have since discovered a volume issued by the U.S. Government Printing Office in 1939 "Testimony of Expert Witnesses Before the Securities and Exchange Commission in the Matter of McKesson & Robbins, Inc." Twelve leading Public Accountants testified that, as a part of internal accounting control, it was necessary for a Public Accountant to investigate the routine of handling incoming mail. (Pages 30, 85, 143, 192, 243, 290, 340, 401, 455, 505, 558, 602).

As appears by a sworn answer to an interrogatory filed by all of the plaintiffs in this case, Roy E. Campbell, the Secretary and Office Manager of the Company testified:

"Q. And did Ernst & Ernst ever ask you about the routine of restricting the opening of mail?

A. No, I do not believe they ever did.

Q. They never asked any question of you which would require the divulgence by you that you were under the restriction of not opening mail addressed to the company to the attention of Nay?"

A. No. They did not.

Furthermore, the Public Accountants in the *McKesson* case testified on internal control in conformity with the affidavits filed by Plaintiffs in this case. Thus, Dr. Joseph J. Klein, a leading Professor and Public Accountant, testified:

"A. In general, the expression 'internal check and control' relates to a subdivision of duties and responsibilities among employees so as to minimize the opportunity for theft, peculation, falsification of records, and commission of errors, by requiring collusion among at least two persons for the perpetration of crime or double errors to escape detection of such errors." (Page 490)

We submit that certiorari should be denied.

Respectfully submitted,

WILLARD L. KING
Attorney for Olga Hochfelder, Agnes Smith, Theresa W. Rothermel, Eugene Voita, Helen V. Feldkamp, Anna L. Jesse, Leon S. Martin, L. Stanbridge Martin and Sears Bank & Trust Company, as Executor of the Estate of Eric W. Stubbs and as Trustee for Lurena Stubbs, Respondents

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Chicago, Illinois 60603